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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 425

SEABOARD AIR LINE RAILROAD COMPANY, ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, FLORIDA EAST COAST RAILWAY COMPANY, ET AL.

No. 555

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FLORIDA EAST COAST RAILWAY COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

REPLY OF THE INTERSTATE COMMERCE COMMISSION TO MOTIONS TO AFFIRM OR DISMISS AND TO THE MEMORANDUM FOR THE UNITED STATES

The motions to affirm or dismiss filed in these appeals disclaim what is evident upon a fair reading of the opinion below, namely, that the district court required application by the Interstate Commerce Commission, in its determination of rail merger applica-

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tions, of standards already rejected by this Court in *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944), and *Minneapolis & St. L. Ry. Co.* v. *United States,* 361 U.S. 173 (1959). Thus, appellee, Florida East Coast Railway Company, at page 11 of its motion declares:

> The District Court, in an opinion by Circuit Judge Rives, unanimously held that
>
> > . . . the Commission must define the "line of commerce" and "section of the country" in which to appraise the probable competitive effects of the proposed merger and must determine whether the effect of the merger "may be substantially to lessen competition" or "tend to create a monopoly." The reason the Commission must make such findings is, most precisely, the fact that antitrust policy, to be given any effect whatsoever, must be measured in terms of criteria that have been developed by Congress and the courts. 242 F. Supp. at 22 [footnote omitted].
>
> This holding was predicated upon this Court's decision in *McLean Trucking Co.* v. *United States,* 321 U.S. 67 (1944) and *Minneapolis & St. Louis Ry Co.* v. *United States,* 361 U.S. 173 (1959), and the statutory duties and powers of the Commission under the Transportation and Clayton Acts.

East Coast and Railway Labor Executives' Association in their motions do not so much as mention *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962), and yet it is manifest that the lower court's reliance upon that decision, as well as upon the 1950 revision of the Clayton Act, led it to the error, acknowledged in the memorandum for the United States, that, not only must the Commission, in its consideration of a rail merger proposal, make a "determination of whether the effect of the merger 'may be substantially to lessen competition' or 'tend to create a monopoly', . . . [but] must [also] define the area of effective competition by reference to a product, or service market (the 'line of commerce') and a geographic market (the 'section of the country')." 242 F. Supp. 21; J.S., pp. 30–31.

It was for precisely this reason that the Commission appealed from the lower court's decision. The very issue posed by the Commission's appeal was whether the district court had erred in holding that the Commission was obliged to make findings of the probable anticompetitive effect of a proposed railroad merger in terms of the precise language of Section 7 of the Clayton Act and the delineations of service and geographic markets and submarkets required in Section 7 cases. Significantly, none of the appellees addressed themselves directly to that question.

The Commission was well aware of its obligation to take into account the general policy underlying the antitrust laws in addition to the objectives of the Interstate Commerce Act and the National Trans-

portation Policy. Even a cursory examination of the Commission's report approving conditionally the proposed merger of the Seaboard and Coast Line, reveals that it was structured upon this Court's decisions in the *McLean* and *M. & St. L.* cases. The Commission would welcome a review of its decision upon the standards therein enunciated, a review denied it by the lower court's threshhold determination that "the Commission is required to decide whether or not Section 7 of the Clayton Act would be violated by the proposed merger." 242 F. Supp. 21; J.S., p. 29.

The Commission sought such review in the court below by its appeal to this Court. However, it concurs in the suggestion of the United States that the error of the lower court may appropriately be corrected by this Court summarily and the case remanded to the lower court. We submit that such remand would permit the court below to perform its proper reviewing function of ascertaining whether the Commission, in approving conditionally the proposed Seaboard-Coast Line merger, properly applied the principles enunciated by this Court in *McLean Trucking Co.* v. *United States, supra,* and *Minneapolis & St. L. R. Co.* v. *United States, supra.*

Respectfully submitted,

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OCTOBER 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965

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